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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/802,664	03/17/2004	Shawn D. Rogers	13050/12	2665
757 7590 08/23/2007 BRINKS HOFER GILSON & LIONE P.O. BOX 10395 CHICAGO, IL 60610			EXAMINER DICKY, THOMAS L	
			ART UNIT 2826	PAPER NUMBER
			MAIL DATE 08/23/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/802,664	Applicant(s) ROGERS ET AL.	
	Examiner Thomas L. Dickey	Art Unit 2826	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 09 August 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

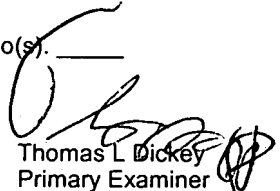
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____
Claim(s) objected to: 5 and 6.
Claim(s) rejected: 1-4, 7, 48, 52-54 and 58-60.
Claim(s) withdrawn from consideration: 8-47, 49-51, 55-57 and 61-71.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s): _____.
13. ☐ Other: _____.


Thomas L. Dickey
Primary Examiner
Art Unit: 2826

Continuation of 3. NOTE: In claim 48, line 12, Applicant proposes to cure the objection to the lack of antecedent basis for "the conductive rod pairs" by removing the definite article "the" (and incidentally adding a purely cosmetic change, deleting the language "a plurality of" in referring said rod pairs. This second change is cosmetic because the use of the plural "pairs" means a plurality is necessarily required to meet this limitation, whether Applicant chooses to spell this out or to merely imply it). The result of this change would be the introduction of new elements ("rod pairs") entirely separate from the element previously introduced in line 9 as "a rod pair." Whether the invention of claim 48 has two separate elements, the first being the line 9 "rod pair," and the next being the proposed line 12 "rod pairs," would create a new issue not previously searched or considered.

Continuation of 11. does NOT place the application in condition for allowance because: It is argued, at page 14 of the remarks, that "As many of the words and phrases of a patent claim have acquired a special meaning in the art of claim drafting and interpretation, the Applicants have made use of these forms in making the metes and bounds of the claim as clear as possible to a person of skill in the relevant art, and respectfully request that the objection be withdrawn." However, what is "special" to Applicants may not be "special" to the rest of us.

Some words and phrases used in claiming inventions have indeed acquired special meaning in the art of claim drafting. For example, the transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g. *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term 'comprising,' the terms 'containing' and 'mixture' are open-ended."); *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition 'comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim.); *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 229 USPQ 805 (Fed. Cir. 1986); *In re Baxter*, 656 F.2d 679, 686, 210 USPQ 795, 803 (CCPA 1981); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948) ("comprising" leaves "the claim open for the inclusion of unspecified ingredients even in major amounts"); and *Gillette Co. v. Energizer Holdings Inc.*, 405 F.3d 1367, 1371-73, 74 USPQ2d 1586, 1589-91 (Fed. Cir. 2005), (a claim to "a safety razor blade unit comprising a guard, a cap, and a group of first, second, and third blades" encompasses razors with more than three blades because the transitional phrase "comprising" in the preamble and the phrase "group of" are presumptively open-ended. The court explained "The word 'comprising' transitioning from the preamble to the body signals that the entire claim is presumptively open-ended.") See also MPEP § 2111.03, where this Office has collected the above-cited cases for the edification of examiners and practitioners alike.

Another good example of a word or phrase having acquired special meaning in the art of claim drafting might be the word "substantially." The Federal Circuit has held, "The term 'substantial' is a meaningful modifier implying approximate, rather than perfect." *Liquid Dynamics*, 355 F.3d at 1368. But the definition of 'substantially flattened surfaces' adopted by the district court introduces a numerical tolerance to the flatness of the gripping area surfaces of the claimed applicator. That reading contradicts the recent precedent of this court, interpreting such terms of degree. In *Cordis Corp. v. Medtronic AVE, Inc.*, 339 F.3d 1352, 1361 (Fed. Cir. 2003), we refused to impose a precise numeric constraint on the term 'substantially uniform thickness,' noting that the proper interpretation of this term was 'of largely or approximately uniform thickness' unless something in the prosecution history imposed the 'clear and unmistakable disclaimer' needed for narrowing beyond this plain-language interpretation. *Id.* *Playtex Products Inc. v. Procter & Gamble Co.*, 400 F.3d 901, 907, 73 USPQ2d 2010, 2015 (Fed. Cir. 2005) (internal quote marks removed).

The "special meaning in the art of claim drafting" of the terms "comprising" and "substantially" was not acquired by patent practitioners plying examiners with empty phrases and fancy words, devoid of references other than to pedagogy (Landis). These meanings were acquired by hard work on the part of dozens of lawyers, clerks, and jurists, all of whom took the trouble to explain WHY (based on precedent. Note that *Playtex Products* cites two separate precedential authorities in the space of half a paragraph. In § 2111.03, the MPEP cites seven in a paragraph and a half) certain words or phrases were "special."

It is argued, at page 15 of the remarks, that "In order to better understand the Examiner's description of FIG. 13 of the reference, and for the purpose of this traverse only, the following table associates reference numbers found in Hernandez with features of the FIG. 13, so that the differing terminology may be better discussed."

Applicants imply that the Examiner has "described" FIG. 13. That is just plain untrue. The Examiner's work has been confined to pointing out where, within the Reference, the claimed invention is described. For example, the Examiner explained, "the second conductive layer is visible, but not numbered, in figure 12. It is the conductive layer separated from lattice 124 by a first dielectric layer 92, also not numbered in figure 13 but numbered 12 (figure 9 shows numeral 12, but that part is referred to in figure 10 and the written description as dielectric layer 92. The written description does not refer to a part #12 in figure 9) in figure 9. Since figure 9 uses part #98 to refer to the second conductive layer, and figure 12 uses no part #, the second conductive layer will be referred to, for convenience, as part #98." Later the Examiner advised the reader to "Note figures 7-10 and 12 (note that figure 12 employs lattice 96 as shown in detail in figure 9, said lattice 96 being identified as a lattice 44 of chip capacitors 102 in figures 6-8, the construction of said lattice 44 being detailed in figures 6-8. The rectangular lattice of chips 102 is best seen in cutaway figure 10), column 5 lines 19-36, column 6 lines 2-24 and 65-67, and column 7 lines 1-8 of Hernandez." Applicants apparently believe that, even though Hernandez discloses an apparatus that anticipates the claimed invention, the Examiner lacks the verbal skills to be able to clearly point this out. This may be true. But this issue is best raised on appeal. Next, Applicants must clearly understand that terminology, whether "differing" or not, is totally immaterial to the issue of anticipation. The reference must describe the claimed elements "arranged as in the claim under review, *Lindemann Maschinenfabrik v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed.Cir. 1984), but this is not an '*ipsissimis verbis*' test, *Akzo N.V. v. United States Int'l Trade Comm'n*, 808 F.2d 1471, 1479 & n.11, 1 USPQ2d 1241, 1245 & n.11 (Fed.Cir. 1986), cert. denied, 482 U.S. 909 (1987)." *In re Bond*, 910 F.2d 831, 833, 15 USPQ2d 1566, 1567 (Fed. Cir. 1990). Therefore, identity of terminology is not required. See MPEP §2131.

It is argued, at page 16 of the remarks, that "As best understood, the Applicants now paraphrase the Examiner's description of FIG. 13 of Hernandez as: A second conducting layer (98 or 128) separated from the lattice (124) by a first dielectric layer (92). The second conductive layer (98 or 128) separated from the first conductive layer (132); first conductive rods (120) comprising plated vias passing

through first dielectric layer (92) and the first dielectric layer is disposed between the first (132) and second (98) conductive layers, connected to the second conductive layer (92) and extending to the first conductive layer (132); and chip capacitors (102) arrayed over substantially an entire area of the first conductive layer (132), connecting the first conductive rods to the first conductive layer, and arranged in a lattice (124)." The Examiner actually wrote a detailed rejection (in fact a pair of detailed rejections) pointing out what Hernandez disclosed and where (not necessarily confined to figure 13), within the reference that disclosure could be found. The Examiner sees no purpose in going over Applicants' "rejection." For one thing, Applicants do not cite to particular points in the reference except figure 13, which citation Applicants appear to believe favors their argument. For another, the actual rejection made by the Examiner contains 349 words, including 160 words devoted to pin-citing particular sections of the reference. Applicants' "executive summary" of this rejection includes 124 words with only two words devoted to pin-citing particular sections of the reference. It hardly seems worthwhile relying on a 122-word summary when the thing summarized only has 189 words (plus, admittedly, 160 words devoted to pin-cites). At page 16 Applicants go on to argue, "Arguendo, accepting this description, the Examiner asserts that the first conductive rod (120) (for example the leftmost rod in FIG. 13) passes through the first dielectric layer (92) and connects to the second conductive layer (98 or 128) and extends to the first conductive layer (136)." The problem with this argument is that it requires putting words in the Examiner's mouth. "Putting words" is, in fact, too mild an expression. The Examiner stated:

[T]he second conductive layer is visible, but not numbered, [emphasis added] in figure 13. It is the conductive layer separated from lattice 124 by a first dielectric layer 92, also not numbered in figure 13 but numbered 12 (figure 9 shows numeral 12, but that part is referred to in figure 10 and the written description as dielectric layer 92. The written description does not refer to a part #12 in figure 9) in figure 9. Since figure 9 uses part #98 to refer to the second conductive layer, and figure 13 uses no part #, the second conductive layer will be referred to, for convenience, as part #98."

Final Rejection (mailed 6/18/07), page 3. It is noted that in figure 13, the outer voltage plane (the part Applicants now assert the Examiner identified as the claimed "second conductive layer") is clearly marked "128." If, as Applicants assert, the Examiner identified part #128 as the "second conductive layer," why in the world would the Examiner have written, "the second conductive layer is visible, but not numbered, in figure 13?" Applicants' assertion that the Examiner identified part #128 as the "second conductive layer" also suffers from the fact that the numeral "128" appears nowhere in the written rejection.

Applicants go on to argue, "The Applicants respectfully submit that the first conductive rod (120) passes through [sic, through] the second conductive layer (98 or 128) and extends to the first conductive layer.... Using the Examiner's terminology, none of the other rods in FIG. 13 are read on by Claim 1." This is only true if Applicants are allowed to "re-write" the rejection in such a way that the rejection recites part 128 as being the claimed "second conductive layer." In the rejection (the real one, not the ersatz version presented by Applicants) the claimed second conductive layer is the unnumbered (in figure 13, but located in the same spot as the part numbered "98" in figures 9 and 10) conductive layer overlying the unnumbered (in figure 13, but located in the same spot as the part numbered "12" (in an apparent typo) in figure 9) dielectric layer that in turn overlies the (unclaimed) conductive layer 128.

It is argued, at page 17 of the remarks, that "The Applicants respectfully traverse the Examiner's characterization of element 102 (not labeled, but shown in FIG. 9 [and figure 10]) in FIG. 13 as a 'chip capacitor'. At col. 6 line 10-11, the reference describes element 102 as 'spaced ceramic chips'. Hernandez differentiates this element at col. 6, lines 38-49, where element 102 from being a chip capacitor, as an advantage of the invention is said to be that it 'eliminate[s] the need for discrete decoupling capacitors' (col. 6, lines 19-21)."

Col. 6 lines 38-49 are in fact highly instructive as to exactly what Hernandez means by "discrete decoupling [sic, decoupling] capacitors." Note Col. 6 lines 40-43, where Hernandez states; "Board 90 eliminates the need for expensive pick and place machinery for decoupling capacitors. It also eliminates solder quality problems inherent with decoupling capacitors." Hernandez's description of the methods used to install these capacitors makes it clear that they are the type of capacitor Applicants refer to, in paragraph 0013 of the instant specification, as "surface mount technology (SMT) capacitors." In their specification Applicants also state, paragraph 0051, that "The chip capacitors may also include non-SMT type capacitors." In view of this statement the Examiner is of the belief that the claimed "capacitor" encompasses both SMT capacitors (the sort Hernandez intends to avoid using) and non-SMT capacitors, such as the embedded chip capacitors 44 disclosed by Hernandez in figures 6-8 and column 5 lines 19-30. Note in particular column 5 lines 21-23, stating "Capacitive element 44 is a known multilayer ceramic chip capacitor...." Hernandez also makes it perfectly clear to everyone except the willfully ignorant that the "spaced ceramic chips 102" of figures 9-12 are identical to the "chip capacitors 44" of figures 6-8. Note column 6 lines 9-12, where Hernandez states, "As described in detail above [emphasis added], flexible dielectric sheet 96 comprises a planar layer of spaced ceramic chips 102 separated by a flexible polymeric material 104," and column 6 lines 4-7, where Hernandez states, "Circuit board 90 comprises a pair of exterior electrically insulative layers 92 and 94 which sandwich therebetween a high dielectric flexible layer 96 of the type described in detail with regard to FIGS. 1-8 [emphasis added]."

At page 17 Applicant further argues that "At best FIG. 13 shows a linear (not rectangular) pattern of dissimilar rods, two of which the Examiner may choose to call a pair, but since the rods are equally spaced from each other, the limitation in Claim 48 of "adjacent", describing a pair of rods, is not found. Moreover, the figures of the reference do not reasonably suggest that a periodic pattern of pairs of rods, where the rods are as described in Claim 48, is formed." Figure 13 is, however, what is known as a "sectional view." In this view, objects having a three-dimensional existence are depicted, for simplicity's sake, in two dimensions. Two-dimensional (e.g. rectangular) patterns are shown in one dimension (i.e. linear). A better view of the locally nearly periodic features of the device disclosed by Hernandez may be found in the perspective view of figure 10. Figure 10 shows only the top of the disclosed device, featuring second conductive layer 98. The claimed "locally periodic or nearly periodic pattern" of rods is not visible because the rods are hidden behind locally periodic (or nearly so) elements of second conductive layer 98. However, it is possible to rely on figure 13 for evidence that rods corresponding to said locally periodic (or nearly so) conductive layer elements are in fact present in the device disclosed by Hernandez.

Applicants should be careful (at the very least, when estimating their chances of prevailing on appeal) not to confuse the globally periodic pattern Applicants appear to be asserting is claimed with the locally, nearly periodic pattern that is actually claimed. In *Ex parte Whitman and Davlin*, Appeal No. 2006-2210 (available from the Board's website at <http://des.uspto.gov/Foia/BPAIReadingRoom.jsp>), the Board explained to those appellants that "The arguments actually made before us are not consistent with the actual scope of the claims. The arguments in effect are more specific than the scope of the claimed features argued." This is an easy trap to become ensnared in, especially when one forms the habit of making arguments more specific than the scope of the claimed features while arguing to the Examiner.

It is argued, at page 18 of the remarks, that "Claims 48, 52-54 and 58-60 were rejected under 35 U.S.C. 102(b) as being anticipated by

McKinzie III (US 6,476,771; 'McKinzie'). FIG. 9 of the reference is used as showing the elements described by the Examiner. The Applicants respectfully traverse the Examiner's characterization of elements 911 and 914 as 'chip capacitors' or even as capacitors, based on a purported association in the reference with 'capacitive frequency surface (FSS) capacitors.' The term 'capacitive frequency selective surface (FSS)' is used to describe element 102 in Fig. 1 (col. 3, lines 29-31), and is not found elsewhere in the specification, nor is the word 'capacitor' found in the phrase. The Examiner's terminology describing element 102, or elements 911 and 914, as a 'chip capacitor' is not supported by the specification, and the Examiner makes no attempt to explain why a reasonable person of ordinary skill in the art would accept the proffered term." This is the same argument Applicants presented in their paper filed 5/1/2007. In the paper mailed 6/18/2007, the Examiner stated that he found this argument persuasive as to claims 1-7, which claim, "chip capacitors" not found (as Applicants and Examiner agree) in McKinzie III. The Examiner did not find this argument persuasive as to claims 48,52,54, and 58, insofar as these claims claim "capacitors" (which term must necessarily encompass any and all electrical elements capable of capacitive functioning), not "chip capacitors" as claimed more narrowly in claims 1-7. The Examiner should have added, at that time, that this argument is equally persuasive as to claim 53, which specifically claims, "chip capacitors." Only claims 48,52,54, and 58 should be considered rejected over McKinzie III.

It is argued, at pages 18-19 of the remarks, that the Dorland's Illustrated Medical Dictionary definition of "capacitor" as "A device for holding and storing charges of electricity" is a meaning limited specifically to the healing arts and does not reflect the general usage of this term. In general usage, Applicants argue, the meaning of the term "capacitor" is the Merriam-Webster's Collegiate Dictionary (10th Edition) definition of capacitor as "a device giving capacitance and usu. consisting of conducting plates or foils separated by thin layers of dielectric...."

The Examiner finds this argument confusing. Note that the specific healing arts meaning of "A device for holding and storing charges of electricity" encompasses the meaning Applicants assert is the general meaning; that is to say, the Merriam-Webster's Collegiate Dictionary (10th Edition) definition "a device giving capacitance and usu. consisting of conducting plates or foils separated by thin layers of dielectric...." is but one example of "a device for holding and storing charges of electricity" (which Applicants assert is a specific meaning limited to the healing arts). How can a limited, specific meaning encompass a general meaning? Shouldn't it be the other way around? Shouldn't the general, Webster's Collegiate meaning encompass the specific, Dorland's Illustrated Medical meaning?

Also it should be noted that the Columbia Encyclopedia (Columbia University Press 2004), Hargrave's Communications Dictionary (Institute of Electrical and Electronics Engineers, Inc. 2001), the Academic Press Dictionary of Science and Technology (Elsevier Science & Technology, 2002), Chambers 21st Century Dictionary, (Chambers Harrap Publishers Limited 2001), Philip's Encyclopedia (Octopus Publishing Group Ltd., 2003), the Macmillan Encyclopedia, (Market House Books Ltd 2003), the Crystal Reference Encyclopedia (Quotations Ltd, 2005), the Penguin English Dictionary (Penguin Books, 2000), Collins English Dictionary, (HarperCollins Publishers 2000), and the Penguin Dictionary of Physics (Longman Group Ltd, 2000) all agree in principle that in "electricity," "capacitance" means "the capability of a body, system, circuit, or device for storing electric charge," i.e. "the property of a system that enables it to store electric charge." Websters-online-dictionary.org defines "capacitance," in "electrical engineering," to mean, "The property which permits the storage of electrically separated charges." It would therefore appear that the actual Webster's Collegiate meaning of "capacitor" (with all the high-falutin' language replaced by simple, commonly understood words) is "a device giving capacitance-the capability for storing electric charge." If you please, what is the difference between "a device giving capacitance-the capability for storing electric charge" and "a device for holding and storing charges of electricity?" Applicant "traverses the rejections on the basis that the Examiner has not used the term 'capacitor' as a person of ordinary skill in the art (electrical engineering) would have done in understanding the claim and that, as such, a prima facie case of anticipation has not been made out" Quite frankly, the Examiner is of the opinion Applicant put this argument forward without making a good faith effort to assure himself that it had a basis in fact.